No. 147.

SEP 9 190
JAMES H. McKENNEY,
CL

In the Supreme Court of the United States

Brf. of Deweese for Appellees

No. 147

Filed Sept. 9, 1901.

GEORGE F. EMBLEN,

Appellant,

v.

THE LINCOLN LAND COMPANY ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

J. W. DEWEESE AND
FRANK E. BISHOP,
Attorneys for Appellees.

In the Supreme Court of the United States.

GEORGE F. EMBLEN,
Appellant,
v.
THE LINCOLN LAND COMPANY ET AL.,
Appellees.

No. 403.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

The appellant's action is by bill to charge the defendants with a trust in a certain tract of land, the title of which had been obtained by the defendant George F. Weed by pre-emption cash entry in September, 1885.

The bill shows that the appellant filed his contest against the pre-emption entry of Weed in October, 1888, under section 2, chapter 89, of the laws of the United States, approved May 14, 1880, which is as follows:

"Section 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the registrar of the land office of the district in which said land is situated of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands; provided that said registrar shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant and not to be reported."

Appellant claims that he acquired a vested right in the lands in question by reason of the efforts he made in contesting the claim of Weed. The bill shows (page 7)

that Weed made his entry September 19, 1885; that the appellant filed contest in October, 1888, for the purpose, as he alleged, of showing that the laws of the United States had not been complied with on the part of Weed; and for the further purpose of giving the appellant the preferred right to enter said lands under the provision of section 2, chapter 89, of the laws of the United States, approved May 14, 1880, as hereinbefore quoted; that a decision was rendered by the registrar and receiver on May 21, 1889, dismissing the appellant's contest for failure of proof; that the appellant appealed to the Commissioner of the General Land Office, who on February 20, 1890, reversed the decision of the local land officers, holding said entry of Weed for cancellation; that Weed applied for a rehearing before the commissioner, and thereupon the town of Yuma, which had been built up on the premises, intervened, and that a rehearing was ordered by the commissioner before the local land officers at Akron, in the state of Colorado. (Page 9.) The appellant did not appear at said hearing so ordered, but filed objections to the jurisdiction, on the ground that one of the local officers was an interested party. Appellant's objections, however, were overruled, a hearing was had, and a decision rendered against the appellant in favor of Weed's title. (Page 10.) Thereupon the appellant appealed to the General Land Office and the decision of the local officers was affirmed on said appeal and the appellant's appeal rejected. The appellant then appealed to the Secretary of the Interior, who, on January 9, 1893, affirmed the action of the Commissioner of the General Land Office in dismissing the appellant's contest. This final decision was made by Secretary Noble, and it appears by the bill that the Hon. Hoke Smith, a subsequent Secretary of the Interior, undertook to set aside the decision of his predecessor and ordered another rehearing before the local land officers in Colorado.

It will be seen from this review of the allegations in the bill that the appellant has never at any time had a decision in his favor. Land Commissioner Groff ordered a rehearing, which was had; and the Secretary of the Interior, Hoke Smith, ordered a rehearing after his predecessor in office had made a final decision against the appellant; and, as was held by the court below, Secretary Smith had no power or authority under the law to set aside or reverse the decision that had been made by his predecessor in office.

Noble v. Logging Co., 147 U. S., 165.

U. S. v. Stone, 2 Wall., 535.

It will thus be seen by the allegations of the bill that the appellant has never succeeded in procuring the cancellation of the pre-emption entry made by Weed. He has never brought himself within the provisions of the law under which he seeks to enforce his claim.

But he also alleges that if congress had not confirmed the entry made by Weed, that *he would have established his right*, and succeeded in his contest. This is pleading a mere conclusion, and it is not admitted by the demurrer. But even if it were, that fact would not bring the plaintiff within the provisions of the law under which he claims his right.

The constitution gives to congress the power to dispose of and make all final rules and regulations in respect to territory, or other property of the United States, and the Land Department of the government is a creature of congress. Unquestionably the Land Department could have disposed of the appellant's contest and issued a patent to the land in question on the entry made by Weed; and the appellant would not then have succeeded in procuring the cancellation of the pre-emption entry. If the Land Department, being a creature of congress,

could do this, why could not congress itself quiet the title and direct the issuing of a patent to Weed?

Congress passed the act of May 14, 1880, under which the appellant claims his right to contest, and congress also passed the act confirming the title to the land in question, in Weed.

In the case of Wisconsin Central R. R. Co. v. Forsyth, 159 U. S., 46, the court held:

"But it is a rule of equal or higher significance that every act of congress making a grant is to be treated both as a law and a grant; and the intent of congress, when ascertained, is to control in the interpretation of the law."

See also the case of St. Paul Ry. Co. v. Greenhalge, 26 Fed. Rep., 563.

Appellant's counsel, in their brief, admit that congress could waive the fraud, if any, in Weed's title and direct the issuance of a patent. They also admit that appellant had not succeeded in his contest and was not entitled, under the law, to a patent nor to a preference right to file on the land, but claim that he had an equitable right to charge Weed with a trust in his favor.

We contend that even if the court should believe that congress should not have interfered in the contest to quiet the title, the fact that it has done so, is within its power, and cannot be questioned by the court.

See the case of Hartman v. Warren, 76 Fed. Rep., 162, wherein the court said:

"The case of the appellant, then, is this: More than three years after Warren had entered and paid for the land, more than three years after the land department had adjudged that it was his and had issued to him its certificate to that effect, but before the clerical act of issuing his patent had been performed, Hartman offered

to locate upon it some Porterfield warrants that could not lawfully be so located, and his offer was rejected. From that time to the present his claim to the land has been steadily rejected, and the right of Warren to it has been uniformly maintained by the officers of the local land offices, by the commissioner of the general land office, and by the secretary of the interior. The appellant is not now, and he never has been, in privity with the United States. He has never acquired any right to or interest in the land. He is a stranger to the title, and a stranger to all the parties who have ever held it.

"Can one who has acquired no right to a tract of land maintain a suit in equity to charge the owner of it with a trust in his favor, because the United States sold or granted it to that *owner through an error of law?* This is the next question in this case, and it is not a new question in this court. It was carefully considered and answered in the negative in the case of Deweese v. Reinhard, 10 C. C. A., 55, 59, 60; 61 Fed., 777, 781, and 19 U. S. App., 698, 706. In the opinion of this court, which was delivered by Judge Thayer in that case, will be found a careful review of many pertinent authorities and a clear statement of our views upon this question and the grounds upon which they rested. It is useless to repeat them."

Moss v. Dowman, 88 Fed. Rep., 181.
Frisbie v. Whitney, 9 Wall., 187-196.
Yosemite Valley Case, 15 Wall., 77.

The power of congress under these conditions is discussed in the case of Norton v. Evans, 82 Fed. Rep., 806, a case decided by this appellate court; the opinion being written by Justice Brewer, wherein it is said:

"The plaintiff had not settled upon the land. He certainly does not come, therefore, within the law of this proviso. He had not even entered the land. His contention is, however, that he had tried to enter the land—had a right to enter it; that his application was erroneously refused by the local land officers; that he had sought to settle upon the land and had been prevented therefrom by the wrongful acts of one of the defendants;

that all this took place before the passage of the act of 1887, and that thereby he acquired a vested right in the land which even congress could not take away. He refers to Ard v. Brandon, 156 U. S., 537, as authority for the proposition that he could not be deprived of any rights by the wrongful acts of the local land officers, and insists that therefore the case must be treated as though he had actually made a homestead entry and did acquire such a right in the land as was beyond the reach of congress to disturb by subsequent legislation; and concludes therefrom that the act of 1887 has no application to this case. We are unable to agree with this contention. He is in no better position than if he had been allowed by the local land office to make the entry. Such an entry creates no vested rights as against the United States and does not interfere with the power of congress by subsequent legislation to dispose of the land."

In the case of Wagstaff v. Collins, 97 Fed. Rep., 8, this court, in considering the question of vested rights which it was claimed would preclude any action on the part of congress in disposing of lands, said:

"It is urged, however, in opposition to this view, that the complainant's ancestor had acquired a vested right in the land by virtue of his homestead claim and residence thereon, of which neither he nor his heirs could be deprived by subsequent legislation, and that the complainants are therefore entitled to the land, to the exclusion of the purchasers from the railway company, although congress clearly intended to confirm the purchasers' title. We are not able to assent to this proposition. In the case of Shiver v. U. S., 159 U. S., 491, the doctrine was fully approved that an entry upon public land, accompanied by residence thereon in pursuance of such permission as is given by the land laws of the United States, confers no vested interest in the land until the settler has remained in possession for the length of time or done the acts which under the law entitled him to a patent. Such a settlement, it was said, protects the settler from intrusion by others, but confers no right as against the United States."

Counsel for appellant claims that his position is supported by the decision of Judge Deady in the case of Pennoyer v. McConnaughy, 140 U. S., 1, which is quoted on page 19, contending that, by the principles announced, Emblen obtained by his contest a vested right in the land, of which the Congress of the United States could not deprive him. But it will be noticed that this court has said, in reviewing this decision, in effect, that it could not apply where the contestant had not perfected his contest, using this language:

"We think this view very forcible, and it would be conclusive to our minds but for the consideration which suggests itself that the bare application itself, unaccompanied by the payment of any consideration, partakes somewhat of the nature of a pre-emption claim under the laws of the United States, with reference to which it has been held that the occupancy and improvement of the land by the settler, and the filing of the declaratory statement of such fact, confers no vested right upon him, as against the Government of the United States, until all the preliminary acts prescribed by law, including the payment of the price, are complied with. Yosemite Valley Case, 15 Wall., 77; Frisbie v. Whitney, 9 Wall., 187."

So that the appellant, as appears by the bill, has simply made an attempt, under the act of 1880, to obtain the right of a preference over all others to make a filing upon said land, but in said attempt never succeeded in having the entry of Weed cancelled, and, consequently, he never obtained the right of such preference.

Appellant's action was instituted for the purpose of obtaining said right, and instituted under the said act of May 14, 1880, hereinbefore quoted. That act did not pretend to give the appellant or any contestant any other than a preference right to file after cancellation of the previous claimant's right.

The court will notice that in the bill (page 17 of record) it is alleged that the appellant relinquished all claim of preference right to this land, in words and figures following:

"George F. Emblen

v.

George F. Weed.

Before the Register and Receiver, Denver, Colorado.

involving said Weed's pre-emption cash entry, No. 4990, made Sept. 19th, 1885, upon the S. E. (12), Sec. 32, Tp. 2 north of R. 48 west.

Now on this 27th day of April, 1889, comes George F. Emblen, contestant, and being duly sworn under oath says that he claims no preference right of entry upon said land above described under the second section of the act of May 14th, 1880, and that he hereby relinquishes any and all preference right to said land under the act aforesaid.

GEORGE F. EMBLEN.

Subscribed and sworn to before me this 27th day of April, 1889.

F. J. MOTT, Register."

Counsel for appellant claim that this relinquishment was not authorized, contemplated, or provided for by law, and that it was in the nature of an offer which was never accepted. In answer to that we say that the relinquishment speaks for itself. It was made, sworn to, and filed as a part of the record of the proceedings had with reference to this contest. What is said in the bill about the paper being unauthorized and made in the nature of an offer, are mere conclusions of fact and law which the demurrer does not admit. These allegations are no proper part of the bill and are not admitted by the demurrer.

Fitzgerald v. R. R. Co., 45 Fed. Rep., 819.

Water Co. v. Keyes, 96 U. S., 199.

This relinquishment effectually amounts to an abandonment on the part of the appellant of all the right he

had by virtue of the contest which he had instituted. The court should not lose sight of this fact; and for that purpose we quote the language of the appellant in his bill, as follows:

"That the purpose of your orator's said contest was not only that the laws of the United States should be complied with on the part of the said Weed, defendant, in relation to the cash pre-emption entry on the public lands of the United States, but that upon the defeat of the said Weed for the causes alleged in the said contest papers, he, the said Emblen, might be enabled to enter said lands under the provisions of section 2 of chapter 89 of the Laws of the United States, approved May 14, 1880; which said section 2 under which said contest was made and under which your orator's right of entry of said lands was assured to him upon the defeat of the pre-emption entry of the said Weed as aforesaid, is in words and figures following, to-wit:" (P. 7.)

(Then follows section 2 of said act.)

This same allegation is practically repeated on the next page of the defendant's bill.

Under the first paragraph of this allegation, there is no privity existing between Emblen and the United States. He is a volunteer and a stranger. Under the second clause, where he makes his contest under the act of 1880 for the purpose of being enabled to make a filing himself after the cancellation of Weed's entry, all his rights were lost by his relinquishment of the benefits of that section. His contest is based upon that section alone.

In the bill it is alleged that an act of congress was passed confirming the title to the land in question in Weed. Appellant refers to the letters and documents that accumulated in the land office concerning this contest, copying the last order and letter of Secretary of the Interior Smith, and charges that Weed procured the congress to pass the act confirming the title. It may not

be inappropriate to refer to the report of the committee of congress, which is a public record, relating to this matter, which is as follows:

[APPENDIX.]

House of Representatives, Fifty-third Congress, Second Session. Report No. 1421.

TITLE TO CERTAIN LAND IN YUMA, COLO.

August 13, 1894.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Meiklejohn, from the Committee on the Public Lands, submitted the following

REPORT:

[To accompany H. R. 7955.]

"The Committee on the Public Lands, to whom was referred the bill (H. R. 5713) to perfect the title to a quarter section of land in the town of Yuma, Colo., the same being the S. E. ¼, section 22, township 2 north, of range 48 west, of the sixth principal meridian, State of Colorado, have had the same under consideration and recommend the passage of a substitute bill herein reported, and that H. R. 5713 lie on the table.

"The facts are as follows: September 19, 1885, George F. Weed made pre-emption cash entry for said land, paying therefor the Government price of $200, and received from the Government officials final receipt therefor.

"Shortly after entry, the tract in question being favorably located and situated for a town site on the B. & M. R. R., the tract was platted to town lots and laid out as a town site.

"A portion of the tract was sold to the railroad company, which built a station depot and other buildings thereon.

"The Government established a post-office at this town and the town was called Yuma. Town lots were sold rapidly, and within ninety days Yuma was a town of 100 inhabitants.

"The town grew rapidly and in a very short time George F. Weed, who entered the land, had sold and disposed of almost the entire 160 acres to many different

purchasers in good faith and for valuable considerations by warranty deeds.

"These innocent purchasers, both resident and non-resident, proceeded to make valuable improvements on these lots and parcels of land, which shortly resulted in building up a town of about 400 inhabitants.

"Early in the year 1887 the town of Yuma was duly organized and incorporated under the laws of the State of Colorado, with mayor, town council, and a full corps of town officers.

"A $6,000 public school building was erected, and the town issued bonds to build same. Also water-works, costing about $12,000, was established and town bonds issued in payment of same.

"Since its incorporation taxes have been levied and collected on the entire tract of land in question for the existence and improvement of the town and to pay the interest upon said bond indebtedness.

"The county seat of Yuma County, with its courts and other county business, was duly established in the town of Yuma, built upon this tract, which is and has been the permanent county seat of said county.

"The total valuation of the property of this town built upon this tract of land is assessed by the county officials at $150,000, on which assessment taxes have been regularly collected.

"Considerable of this tract, consisting of lots and blocks and parcels of land, was bought in good faith by non-residents, who invested their money in the erection of blocks of buildings and other lasting and valuable improvements in good faith, relying on the purchase, uncontested at date of their purchase, by Weed from the Government of the United States, as evidenced by the issuance to him of the final receipt of the Government.

"Not until October, 1888, or three years and more after Weed had been allowed to purchase this land by Government officials, did any one attempt to contest or otherwise dispute the validity of Weed's purchase; but in October, 1888, one, George F. Emblen, filed an affidavit of contest in the land office at Denver, charging that the original entryman, Weed, had failed to comply with the pre-emption law as to residence and had other-

wise failed to comply with the law before the Government had issued to him his final receipt and the certificate of entry, which certified on its face that he had purchased this land under the pre-emption law and would be entitled to patent upon presenting same to the Commissioner of the General Land Office.

"Before this contest was filed, however, and during the three years prior thereto, without any notice to the town authorities or to the county authorities, or to any of the individuals who projected the improvements of said town, erected the schoolhouse, water-works, and other important improvements, they were permitted and encouraged to believe, by the action of the Government in allowing Weed to make final entry of the land, that the title thereto was perfect and that the Government would not take advantage of their investments and outlays.

"The Government, however, permitted Emblen to contest Weed's entry of this land, and the records of the Interior Department show that there were two hearings or trials had before the local office in Colorado, which covered a period of two years, and in November, 1890, the register and receiver of the local land office dismissed Emblen's contest and found that Weed's entry was valid.

"May, 1891, the General Land Office, on appeal, also found in Weed's favor, holding that he had complied with the law.

"January, 1893, on appeal and review of the Commissioner's decision, the Secretary of the Interior, after an exhaustive examination of all the facts and law bearing on the case, decided in favor of Weed's entry as follows:

"'Upon the evidence submitted at the two hearings, I have no hesitancy in finding that Weed made his settlement and filing in good faith, and that he complied with the law as to residence and improvements.

"'I am also satisfied that he did not cause and allow said lands to be built upon as a town site and use the same for purposes of trade prior to his entry, as charged by Emblen.'

"This decision is found in volume 16, Land Decisions, p. 28.

"Notwithstanding this final decision in favor of Weed's

title to this town property, which, owing to the usual delays, was not rendered until over four years after the contest was filed. Emblen, the contestant, filed additional papers asking for a rehearing of the case involving new trials before the register and receiver, Commissioner of the General Land Office, and Secretary of the Interior.

"The Secretary of the Interior in August, 1893, or nearly eight years after the Government had sold the land to Weed, and after five years of fruitless contest and litigation against Weed's entry, and after concurring decisions of the register and receiver, Commissioner of the General Land Office, and of the Secretary of the Interior, holding that Weed had fully complied with the law in every respect, granted Emblen's request for another opportunity to contest Weed's rights to this land upon identically the same charges as contained in the original contest.

"This order of the Secretary for a rehearing remains of record, but is still unexecuted.

"This committee finds as a result of its examination of all the records in the case—

"First. That the inhabitants and property-owners of the town of Yuma, involved in the above contest, purchased their property from Weed after final entry by him from the Government; that he had prima facie right to sell; that they purchased before any contest or dispute arose affecting their grantor's title; that they have suffered incalculable injury in business and property from the cloud imposed on their titles by the pendency of the contest already had covering a period of nearly five years.

"Second. That another contest upon the same charges, which, in all probability, will last several years longer, can only work greater hardship, the prolongation of which will utterly destroy the business growth and prosperity of this unfortunate town.

"Third. We find that the Government alone is interested in this second contest, since the contestant, George F. Emblen, has filed formal relinquishment of his right to enter said land as a successful contestant in case the second contest should be decided in his favor.

"Fourth. We find also that even though the entry of Weed should be canceled under the present proceedings,

neither the contestant nor any one else would be permitted to enter the land covered by this town for private purposes, since public lands settled upon and used for town purposes are not subject to entry under the public-land laws, except for such purposes.

"Fifth. We find also that the titles of persons who have purchased in good faith from the original entryman, Weed, can be protected and preserved best by the Government confirming and patenting to Weed the legal title to said tract, through which title conferred on Weed his transferees would be secured through his conveyances to them long since made.

"Sixth. The committee is therefore of the opinion that the United States, having sold this tract of land to Weed in September, 1885, and received the sum of $200, the Government price therefor, and having, at the instance of the contestant, prosecuted a contest against the legality of said entry for a period of nearly five years, which resulted in the concurring decisions before referred to fully sustaining the validity of said entry, it is neither just to the innocent purchasers involved nor expedient for the Government to further prosecute said contest.

"Therefore, the committee recommends that Weed's entry be confirmed and patented by the United States, to the end that the inhabitants of the town of Yuma may have their titles settled and further harrassment cease."

This report of the congressional committee set forth the main facts showing the condition of the land and title involved at the time of the pasage of the act of congress. The pre-emption entry had been made by Weed for more than three years prior to the filing of a contest by Emblen. The land certificate had been duly issued and on the faith of that quite an extensive town had grown up and had been established as the county seat of Yuma county.

In the contest proceedings the decisions had been favorable to Weed and against Emblen; not only so, but Emblen had relinquished his preference right given by the statute under which he was contesting. The intent

of congress in passing the act quieting the title in Weed, must be determined by the situation of the parties and the facts pertaining to the matter affected by the act in question. All of these conditions, it is to be presumed, were duly considered by congress, and the act that was passed quieting the title in Weed was not only a law but was also a grant.

It is not claimed that the quieting of the title in Weed by the act of congress and the issuance of a patent were obtained by fraud, mistake, or imposition; and consequently several of the citations made by counsel for appellant are inapplicable to the questions here at issue. Counsel does, however, in referring to the act of congress in question, speak of it as having been "procured" by the appellees or some of them.

On this point see the case of O'Brien v. Wheelock, 93 Fed. Rep., 907, where the court say:

"In our consideration of this question we have assumed, in accordance with the allegations of the plaintiff, that the defendants, or some of them, procured the passage of the act of 1871; but we are of opinion that it is not proper to say that the enactment was procured by any individual or individuals. It must be conclusively asumed that the legislature, although hearing what individuals said on the subject, acted upon its own judgment as to what was proper to be done."

The bill filed by the appellant does not show that he would be entitled to make a filing on the said land, even though he succeeded in having the entry of Weed cancelled. He does not show that he is qualified to make an entry. Moreover, the facts alleged in the bill disclose the fact that a town has grown up on the said land, and under the land laws there could be no pre-emption or other entry by a private individual, unless it would be for the purpose of town site; and the town having already

been established, it would not be subject to an entry even for a town site.

As was found by the congressional committee, neither the contestant nor anyone else would be permitted to enter for private purposes the land covered by this town, since public lands settled upon and used for town purposes are not subject to entry under the public land laws, except for such purposes.

In Bohall v. Dilla, 114 U. S., 47, a case in which equitable relief was sought against one who had obtained title by virtue of the rulings and action of the local land officers, Field, J., used this language:

"We do not think the claim of the defendant to the equitable relief he seeks can be sustained on the grounds stated in his answer of cross-complaint. To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title to the claimant, must present such a case as will show that he himself was entitled to the patent from the government and that, in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered, the title should have been awarded to this claimant. (Smelting Co. v. Kemp, 104 U. S., 636; Boggs v. Marcel Smelting Co., 14 Cal., 279, 363.)"

This ruling was followed in Sparks v. Pierce, 115 U. S., 408, in which it was said:

"To entitle a party to relief against a patent of the government he must show a better title to the land than the patentee, such as in law should have been respected by the officers of the land department, and, being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the

claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him."

The foregoing cases are referred to and reviewed in the case of Duluth v. Roy, 173 U. S., 587 (19 Sup. Court Rep., 549), in which last case the principles announced in those cases are reaffirmed; but in the Roy case the court held that, under the allegations showing that the patent had been issued by inadvertence or mistake, these decisions did not apply.

In the case at bar there was no inadvertence and no mistake. Congress, in confirming the title of Weed, had all the facts before it. A careful investigation had been made by a congressional committee and report made, showing all the facts pertaining to the contest and the issuance of the certificate by the government and the long acquiescence in the title of Weed by Emblen and everybody else for more than three years, in which time the town of Yuma had grown up before any pretense was made to contest the title of Weed.

Appellant's counsel in their brief take the position that Weed had the full equitable title to the land in question, citing the case of Sioux City v. Griffey, 143 U. S., 32:

"It was no matter of interest to the company what became of the title. The government, the owner of the land, was satisfied with what Griffey had done—took from him its land warrants as payment, and patented the land. Into the *bona fides* of this transaction no one but the government can inquire."

Then on page 11 of appellant's brief it is said that:

"It is true congress could, if it had not conveyed away its right, waive the fraud of Weed, if any there was in obtaining title to the land, and either allow a patent to

issue in the usual course of the business of the land department or direct the issuing of a patent at once."

If, then, it be true, as laid down in the Griffey case, 143 U. S., 32, and cited with approval by appellant, that it was of no matter to Emblen what became of the title, and that if the government was satisfied with what Weed had done and had taken his money and confirmed his title, and that then no one could enquire into the *bona fides* of this transaction, and if counsel are correct in stating that congress could waive any fraud of Weed, if there was any, what is there left for the appellant in this controversy?

Counsel for appellant claim in their brief that the United States was the owner of the naked legal title to the land in question and that Weed owned the equitable title. Counsel also claim that prior to the act of May 14, 1880, no one but the government had any right to question Weed's title or to assail it as fraudulent.

By the act of May 14, 1880, Emblen was given a preference right to file on this land, provided he was successful in procuring a cancellation of Weed's entry. He was not successful; moreover he relinquished any such right. The government waived its right to question Weed's entry by confirming the same and issuing its patent. It seems clear to us that the decision of the court below should be affirmed.

J. W. DEWEESE AND
F. E. BISHOP,
Solicitors for Appellees.